In the

Supreme Court of the United States

October Term, 1956

No. 19

UNITED STATES OF AMERICA,
Petitioner

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF ON BEHALF OF THE CHESAPEAKE AND OHIO RAILWAY COMPANY

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OPINIONS OF THE COURTS BELOW

The informal opinion rendered by the District Judge in deciding this case, as transcribed by the court reporter, is found at pages 40 to 41, inclusive, of the printed record. The judgment order of the District Court from which the appeal to the Court of Appeals for the Fourth Circuit was taken, is at pages 26 to 27 of the same record. The opinion of the Court of Appeals (R. 43-44) is reported at 224 F. 2d 443.

QUESTIONS PRESENTED

Since the "Questions Presented" for review are so inaccurately set forth in the Government's Briefs in relation to the District Court Proceedings, and since the Respondent desires to present an additional question which arose subsequent to the entry of judgment by the Court of Appeals, it is necessary that they be restated, as follows:

1. Whether the concurrent findings of the two courts below that the shipments involved were voluntarily converted by the Government from export shipments into domestic shipments after reaching Newport News, Virginia, warrant that the judgment be affirmed.

2. Whether the District Court erred in applying the domestic tariff rate to the transportation movement between Pontiac, Michigan and Newport News, Virginia, of such portions of the shipments as were not exported from Newport News but were reshipped from there to domestic storage points and were ultimately exported through Pacific Coast points.

3. Whether the District Court erred in refusing to order a reference to the Interstate Commerce Commission of the question of the reasonableness of the domestic tariff rate between Pontiac and Newport News, as applied to the above shipments.

4. Whether consideration of the two-year limitation period of Section 16(3)(b) of the Interstate Commerce Act was essential to the decision rendered in this case.

5. Whether the two-year limitation period of Section 16(3)(b) of the Interstate Commerce Act is jurisdictional and deprives the Interstate Commerce Commission of power to act upon any claim thereafter filed challenging the reasonableness of a rate.

STATEMENT OF THE CASE

This is an action brought by the Respondent for the recovery of balances of transportation charges on fifty (50) Government carload shipments of automotive equipment (chassis, seat cabs and bodies) moving by railroad from Pontiac, Michigan to Newport News, Virginia, in the period between December 10, 1941 and January 31, 1942. The articles shipped were military supplies. When originally consigned, it was intended that they would be exported from Newport News, in ocean vessels, via the Port of Rangoon, for delivery to the Republic of China. However, they were unloaded and delivered at Newport News and remained there on Government-controlled piers. On March 8, 1942, the port of Rangoon, Burma, fell to the invading Japanese military forces (Partial Stipulation of Facts, R. 23-24). Following this occurrence, no effort was made to export the articles involved from Newport News. In the month of May, 1942, practically all were reshipped by rail on new bills of lading to a Government storage center at Bloomfield, New Jersey, for "reworking and recrating" (Exhibit B to Complaint—Account, R. 19 and R. 38-39).

It was avowed from certain General Accounting Office work sheets, prepared from Army records, that a full year later, on June 1 and 2, *1943*, the articles involved had been reconsigned to another storage center at New Cumberland, Pennsylvania, and that later in that month, some portions were sent to Wilmington, California and other Pacific Coast ports, from which they were exported to Calcutta, India (Exhibit 1, R. 24 and R. 42 A).

Transportation charges on the movement from Pontiac to Newport News were originally assessed by the Respondent in 1942, in accordance with the applicable published domestic tariff rate between those points and were paid by the

Government (R. 24). Four years later, in 1946, the General Accounting Office recomputed the charges upon this movement at the export rate, which was a lower rate. Enforcement of this lower rate was effected by subsequent deductions from other undisputed C. & O. freight bills rendered to the Government. See Exhibit "A" attached to the Complaint – Account (R. 2 and 18).

This action was brought in March, 1952. In the meantime, a companion case between the same parties, involving charges on similar articles transported between the same two domestic points and accruing under almost identical circumstances, was tried and resulted in a judgment for the Railway Company, for charges calculated at the higher domestic tariff rate. That was the case docketed in the same District Court as No. 1268 and referred to as such in the Government's brief. It was appealed by the Government to the Court of Appeals for the Fourth Circuit, and the judgment was affirmed by that Court on August 14, 1954, with opinion reported as *United States* v. *C. & O. R. Co.*, 215 F. 2d 213. No petition for writ of certiorari was filed in that case. A Stipulation of Counsel had been previously filed in the instant case to the effect that the final judgment in Case No. 1268 "shall govern the disposition of the claims involved in this action to the extent that it is applicable" (R. 21).

District Court Procedings

In the trial of Case No. 1268, the Government made no effort to show what became of the articles shipped after they were reshipped from Newport News to War Department storage centers. In seeking to have the export rate applied, it relied upon its good faith intention to export the articles at the time the shipments were started, claiming that the

frustration of this purpose was due to unforeseen war conditions developing after the shipments reached Newport News. It contended that the domestic tariff rate would be unreasonable under the particular circumstances shown. These contentions were overruled by the District Court, as well as by the Court of Appeals, which held that the provisions of the export tariff had not been complied with.

At a pre-trial conference had in the instant case on December 9, 1954, after the Court of Appeals decision in Case No. 1268 had become final, the Government first averred that portions of the shipments involved had been ultimately exported through Pacific Coast points. It moved to refer to the Interstate Commerce Commission the question of whether the domestic tariff rate would be reasonable, "if it should be determined that the shipment involved, or any part thereof, was subsequently exported." In overruling this motion, the Court ruled that the issue to be determined at the trial on the merits, was whether any such ultimate exportation of the shipments or any part thereof as might be shown by evidence, would cause the lower export rate to apply (R. 22-23, 28).

On February 10, 1955, a trial was had in open court on a partial Stipulation of Facts (R. 23-24); certain tariff excerpts (Photostat Exhibit "A," R. 24 and R. 42), and the oral testimony of two witnesses presented by the plaintiff, one being a tariff expert to explain its provisions, and the other to verify the account figures (R. 27-41). At this trial, the Government presented no witnesses, but tendered certain work sheets prepared by the General Accounting Office from Army records, purporting to show several domestic movements of portions of the shipments, followed by ultimate exportation in June, 1943, from Pacific Coast ports to Calcutta.

This Respondent filed a motion in writing to reject and exclude the work sheet evidence of the Government, upon

the ground that the alleged exportation was not in compliance with the published export tariff; that the Government had voluntarily converted all of the shipments into domestic shipments at Newport News; that the articles had left the possession of the carrier and were transported to other domestic points, and stored and reboxed by a private contractor, prior to being exported; that the articles ultimately shipped abroad were not the same originally consigned; that exportation took place from ports to which the export tariff invoked had no application, and did not take place within any reasonable time after delivery at Newport News, and that on these very articles, the Government had since actually enjoyed other export rates through the Pacific Coast points to India in 1943 (R. 25). For the consideration of this motion only, it was agreed that the G A O work sheet data was to be taken as true.

The export tariff provision relied upon by the Government was Item No. 23030 of Tariff 218-M, on page 333, which reads as follows (Exhibit A, R. 24 and 42):

> *"Application of Export Rates to North Atlantic Seaboard Ports of Export*
>
> The rates named in this tariff, or as same may be amended, and designated as 'Export Rates' will apply only on traffic which does not leave the possession of the carrier, delivered by the Atlantic Port Terminal carriers direct to the steamer or steamer's dock upon arrival at the port or after storage or transit has been accorded by the port carrier at the port under tariffs which permit the application of the export rates, and also on traffic delivered to the party entitled to receive it at the carriers' seaboard stations to which export rates apply, which traffic is handled direct from carriers' stations to steamship docks and on which required proof of exportation is given."

Demonstrating the scope and limits of the District Court's hearing and decision on the merits, are the following excerpts from the reporter's transcript of testimony and trial proceedings:

(R. 28-29):

"THE COURT: So the only question for determination at this time is whether the ultimate exportation changes the tariffs as applied to the initial shipment to Newport News?

"MR. SPICER: Yes, sir. We asked for charges from Pontiac, Michigan to Newport News, and the case is similar in every respect to the case tried before Your Honor, one of the cases in which there was a stipulation by Counsel that this was frustrated traffic. The position was taken that Your Honor had not passed on a situation where the goods were exported eventually.

"THE COURT: After they left the possession of the carrier?

"MR. SPICER: Yes. Our position is that this would not be sufficient to change the rate and make the exportation rate applicable.

"MR. RYDER: We are now offering to prove the facts set forth in Exhibit 1. Those facts in this column show what happened to the goods shipped under the bill of lading referred to in this suit.

"THE COURT: As I understand, the government is offering at this time to prove that certain portions of these shipments, after having been diverted from Newport News, and after having left the possession of the carrier, were ultimately exported from some other port?

"MR. SPICER: Yes, and I prepared a motion in line to bring our objection to that proof. We are objecting to your receiving that evidence and ask that it be excluded from these papers. * * *

"THE COURT: All right, gentlemen, I think I understand the questions."

* * *

(R. 40 and 41):

"THE COURT: Do you have any evidence, Mr. Ryder?

"MR. RYDER: Nothing beyond what we offered to prove, as set forth in Exhibit 1.

"MR. SPICER: I would like to have the statement in the Record that there is no representative from the General Accounting Office of the government to make any explanation of the records, which made it necessary for me to call for the explanation in the evidence I have just presented."

* * *

"THE COURT: You have nothing further for the Record?

"MR. SPICER: No, sir.

"THE COURT: Do you desire, Mr. Ryder, to be heard in opposition to this motion?

"MR. RYDER: No, sir, except we do not agree to the motion and object to it.

"THE COURT: You object to the motion?

"MR. RYDER: Yes.

"THE COURT: Gentlemen, as I understand from your statements and from the Stipulation and exhibits, as well as statement of the Counsel, the facts, briefly, are these:

"The shipment involved was from Pontiac, Michigan, to Newport News, Virginia, destined for export to Rangoon. Upon arrival at the port of Newport News, the government, due to the fall of Rangoon, diverted, or caused to be diverted, this shipment which was reshipped to other points in the United States. The goods left the possession of the carrier, the Chesapeake and Ohio Railway Company, without having been exported

from Newport News, the Atlantic Seaboard port of proposed exportation. Subsequently, after the goods had left the possession of the carrier, the goods, or a part of them, were exported from other ports in the United States, but not from Newport News.

"The question proposed is whether the export rate is applicable from Pontiac, Michigan, to Newport News, Virginia, and from the stipulations and exhibits and statements of Counsel, independently of the testimony which has been offered, it appears clear to me that the export rate does not apply under said circumstances from Pontiac, Michigan, to Newport News, Virginia; and therefore, proof of ultimate exportation from other ports, as indicated by Exhibit 1, would not change the applicable tariff, which should be the domestic rate from Pontiac, Michigan, to Newport News, Virginia. Therefore the motion of the Plaintiff to reject proof of ultimate exportation of the shipment will be granted, and the offer of the government, as set out in paragraph four of the stipulation, will be denied.

"Do you gentlemen have any comment concerning the procedure?

MR. RYDER: The only other thing, then, is to enter judgment order.

"THE COURT: In the amount set forth?

"MR. RYDER: Yes.

"THE COURT: Could not an order be entered showing the Court's rejection of the proof?

"MR. SPICER: Yes, and I have presented an order which reads that the Defendant, having no further defense to present, it is considered that the Plaintiff recover the amount as stated."

At the conclusion of the trial, the District Court sustained the Respondent's motion to exclude the work sheet evidence tendered by the Government as Exhibit 1 (R. 42-A), on the

ground that such evidence would not affect or vary the applicable rate, which was the domestic tariff rate from Pontiac to Newport News (R. 40-41). No further defenses being presented on behalf of the Government, the Court thereupon entered final judgment in favor of the Railway Company, based on this rate (R. 26-27). The amount awarded included various uncontested items.

By virtue of the Stipulation of Counsel entered into prior to the trial of the present case (R. 21) and the final judgment entered in Case No. 1268, the Government now expressly concedes that "it is foreclosed" from challenging herein the applicability of the domestic (tariff) rate to that portion of the shipments, if any, which was not eventually exported." (Pet. 9, footnote 7 and Government Brief, p. 8, footnote 5). This also is in accord with the position taken by its trial attorney and was so recognized by the District Judge (R. 22, 26, 31 and 41).

District Court Rulings

In Case No. 1268, the filed "Conclusions of Law" of the District Judge show a holding that the original good faith intent of the shipper that the articles be exported, was not a controlling rate factor and did not, under the governing tariffs, make the export rate applicable, and that the published rates were conclusively presumed to be reasonable (Pet. 32-33).

Likewise, the transcribed oral opinion of the same Judge in the instant case shows a clear finding that the Government had voluntarily "diverted, or caused to be diverted," the shipments involved, and that the "proof of ultimate exportation from other ports," as indicated by its proof, was not such as to justify application of the export rate under the circumstances shown (R. 41).

Court of Appeals Rulings

The Court of Appeals for the Fourth Circuit, in its decision sustaining the ruling and judgment of the trial court, reported at 224 F. 2d 443, held that what was begun as an export movement, was voluntarily converted by the shipper into a domestic shipment; that the case was "clearly governed" by its former decision in Case No. 1268, "and nothing further need be added to what was there said." It further held that "the question of which rate was applicable to the shipment(s) under the circumstances of the case (was) a question which the court (District) was competent to decide," and that no question of reasonableness was actually involved.

As entirely independent and additional grounds supporting the result, it held that there were no administrative questions presented; that all parties before the court "were barred by limitations" from obtaining the relief sought; and that, in any event, the Commission was then without power to entertain any reference. It is submitted that these rulings, as well as those of the District Court, were plainly right.

SUMMARY OF ARGUMENT

1. Both the District Court and the Court of Appeals made a finding of fact that the Government itself voluntarily converted the shipments involved, from export shipments into domestic shipments, after they reached Newport News. These findings were not in dispute and they fully justify an affirmance of the judgments of both courts.

2. The Respondent presented uncontested proof that the only published export tariff rate provision which might have

been applicable to the articles transported, specified that it applied only on freight which did not leave the possession of the port rail carrier, unless and until delivery be made direct to the vessel or its dock or pier. Such tariff had no application to Pacific coast points through which, it was claimed, some of the shipments were ultimately exported. Also, separate, intervening, domestic movements of the articles were made on new domestic bills of lading, on which domestic tariff charges were paid by the Government without controversy. A clear case was made for the application of the domestic tariff rate to Newport News.

3. The record of the case in the District Court affirmatively shows that the denial of the motion for a reference to the Commission on the question of the reasonableness of the domestic tariff rate was based upon a lack of merit to support such motion. The nature of the inquiry and the proof or avowal of proof tendered did not justify such a reference.

4. The opinions of both the District Court and the Court of Appeals plainly showed that a determination of the reasonableness of the domestic rate was not necessary to the result in the instant case. There were no complicated administrative questions presented or suggested.

5. In any event, the two-year limitation provided for challenging the reasonableness of a rate before the Commission is jurisdictional and deprives the Commission of power to act upon a claim of unreasonableness thereafter filed. This nature of the limitation has been recognized for more than forty years by this Court and has been consistently enforced by the Commission. It applies to a judicial reference as well as to an independent proceeding.

ARGUMENT

I.

Concurrent Findings of Courts Below That Shipments Were Voluntarily Converted by the Government from Export Shipments into Domestic Shipments Warrant an Affirmance of the Judgment.

As already pointed out, the informal opinion rendered by the District Judge at the conclusion of the hearing before him on February 10, 1955, shows a clear finding of fact that there was a voluntary conversion of the shipments involved by the Government after they reached Newport News, from the status of export shipments into domestic shipments. There were at least two succeeding domestic movements before ultimate exportation.

There was a full concurrence in this finding by the Court of Appeals as demonstrated by its reported opinion.

It is respectfully submitted that the finding being on a controlling point in the case, this Court should affirm the judgment on this ground.

Tex. & N.O.R. Co. v. *Brotherhood Ry. & S.S. Clerks*, 281 U. S. 548, 549;

United States v. *O'Donnell*, 303 U. S. 501, 508;

Bodkin v. *Edwards*, 255 U. S. 221, 223;

Washington Securities Co. v. *United States*, 234 U. S. 76, 78.

Further justification for the action hereby requested is found in the similar finding made by the same courts in the previously tried companion case, No. 1268, as reported in *United States* v. *C. & O. R. Co.*, 215 F. 2d 213 (in which no writ of certiorari was sought), together with the signed

Stipulation of Counsel filed in the instant case on January 23, 1953, as to the binding effect of a final judgment in No. 1208 (R. 21).

II.

Published Domestic Tariff Rate Was Properly Applied

As already indicated, there were no disputed questions of fact raised at the trial. Item 23030 of the published tariff, relied upon by the Government, emphatically stated that "Export Rates to North Atlantic Seaboard Ports of Export" would only apply on traffic which did not leave the possession of the port carrier until and unless delivery be made direct to the export vessel or such vessel's dock or pier. This tariff showed on its face that it had no application to shipments exported through Pacific Coast points (Exhibit A, R. 24 and 34). On the reshipment made from Newport News to Bloomfield in May 1942, new Government bills of lading were issued and separate domestic tariff charges were assessed and paid without controversy (R. 32-33, 40).

The only issue presented was a question of law—which of two tariff rates governed—a matter of the construction of ordinary words used with their usual meaning. There were no complicated or peculiar circumstances involved, and no specialized knowledge or experience was required for decision.

The Government was chargeable with knowledge that the initial carrier at Pontiac could only receive the articles for transportation in accordance with its published tariffs. It did not claim to show compliance with them. No effort was made to demonstrate that the goods could not have been stripped out of Newport News within one month, or before the fall of Rangoon, or that disaster at the latter point prevented other exportation from Newport News. Since a state

of war had already existed before the first of these shipments left Pontiac, it was already known that the Japanese military forces would overrun Burma whenever possible. The extent of the proof of what was done to the articles after their arrival at Newport News and why, is simply that they were reshipped to other domestic points in May 1942 for undisclosed purposes.

It may well have been that adequate and substantial grounds of military strategy and foresight necessitated delay and changes in war plans during the period involved, but the record is silent as to this.

The Government did take numerous steps to organize, direct, coordinate and fully control foreign ocean transportation of military supplies and personnel, as indicated by the recitals found on pages 3 to 5 of its Brief. The District Court took judicial notice of this situation, especially as to the constant movement of Lend-Lease goods of all kinds and in all directions from the port of Hampton Roads. There has been no assertion or proof herein that the Government was powerless to export military material at this time for eighteen months after it was prepared for use and sent to port for exportation. In fact, no connection was sought to be shown between the original movement of these articles to Newport News and the ultimate movement to India.

Hence, there was nothing whatever in the record at the trial to militate against the enforcement of the domestic published tariff rate—and the decision of the District Court applying it was clearly correct.

This Court has many times affirmed that the rates and charges set forth in the published filed tariffs are conclusively presumed to be reasonable and have the effect of a statute, so long as in force. It is the duty of both shippers and carriers to pay them and the duty of the courts to enforce them. See *L. & N. R. Co. v. Central Iron & Coal Co.*, 265 U. S. 59, 65;

Pittsburgh, etc. R. Co. v. Fink, 250 U. S. 577, 581; and *New York Central, etc. R. Co. v. York & Whitney Co.*, 256 U. S. 406, 408, and *Penn. R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 197.

III.

District Court Did Not Err in Denying a "Reference" to Interstate Commerce Commission on Question of Reasonableness.

It is argued on pages 12 to 16 of the Government's Brief, that the failure to export the shipments from Newport News was "solely by reason of wartime developments occurring subsequent to the arrival of the goods at the port," and that these developments required a prior determination by the Interstate Commerce Commission of whether the existing domestic tariff rate from Pontiac to Newport News was unreasonable as to these shipments. It is elementary that the burden of at least indicating or outlining such unreasonableness would be on the party alleging it. Yet the acknowledged fact that a state of war already existed and that Rangoon fell, are the only circumstances in the record relied upon as supporting any such conclusion. This was plainly insufficient.

It is not claimed that the domestic rate was *per se* unreasonable or excessive in amount, nor was it claimed that the export rate should be applied as a matter of tariff construction. Also, it has been conceded that as to those shipments in the present litigation which could not be shown to have been ultimately exported, the applicability of the domestic rate could not be challenged.

It is contended on page 15 of the Government's Brief that a group of Commission cases, of which *C. B. Fox Co. v. Gulf, Mobile & Ohio R. Co.*, 246 I. C. C. 561 and *General*

Carloading Co., Inc. v. B. & O. R. Co., 206 I. C. C. 243, are typical, and in which reparation was awarded, are persuasive authorities to show that the domestic rate was unreasonable herein.

Those proceedings were all situations in which, because of a lack of available vessel space, certain tariff provisions were held to be unreasonable as to particular private shippers who had exercised due care in advance to insure that their shipments would reach their respective destinations, and where, because of unforeseen subsequent occurrences entirely beyond their control, exportation could not be carried out as planned.

Thus, *C. B. Fox Co. v. Gulf, Mobile & Ohio R. Co., et al*, 246 I. C. C. 561, was a proceeding in which the Commission was asked "to authorize defendants to waive collection of the undercharges," on certain shipments of soybeans intended for export. After moving from East St. Louis, Illinois to Mobile, Alabama in October, 1939, the soybeans were stored in a warehouse awaiting arrival of a steamer for Holland, on which space had been previously contracted for. Before the steamer arrived, the second World War broke out in Europe, and the President of the United States issued a proclamation forbidding American ships to enter the war zone. Numerous unsuccessful efforts were made to export the soybeans to other points and by other vessels before they had to be sold locally because of the absolute prohibitions then imposed on private ocean shipping.

The report of this case shows that the defendant carrier was "agreeable to the protection of the export rate in this instance, with the understanding that the action taken herein shall not be used as a precedent in any other proceeding, but that each proceeding shall be determined by the facts and circumstances surrounding the particular movement." This,

therefore, shows that no general rule was intended to be established by the Commission in approving what was actually a consent agreement between the parties.

It is clear that the circumstances surrounding the shippers in those types of cases were in direct and reciprocal contrast with those present here. The Government was fully recognized at this time as being the preferred shipper as a matter of absolute law, with respect to military goods and personnel. By virtue of the various acts, regulations and restrictions mentioned on pages 3 to 5 of its Brief, it had taken full control of United States ocean shipping facilities to insure full priority to its military traffic and needs. These facilities were available at Hampton Roads, as well as elsewhere. But those same acts and regulations, including embargoes and requisitions of private property, were the means and causes by which private ocean shipping was completely stifled.

Furthermore, whereas the private shippers in the cases cited had every reason to believe that their goods would reach destination without human opposition, the Government knew that war having begun, all of its ocean shipments were subject to possible enemy attack and destruction. This was a risk assumed by it as a normal military risk, rather than by the carriers.

The Court of Appeals for the Fourth Circuit, in the appeal in Case No. 1268, accurately appraised and distinguished the above mentioned Commission proceedings in 215 Fed. 213, 216, as follows:

> "In those cases, however, it appeared that the shipper's ability to export the commodities was completely ended by causes over which it had no control, not as here, that the shipper abandoned the intention to export because one export channel was closed, when others were open,

> and thus voluntarily converted a movement which had begun as one for the export of goods to one in domestic commerce."

It is further worthy of note that there are just as many wartime reparation reported cases in which the Commission specifically upheld the application of domestic rates to so-called "frustrated" shipments of private shippers, as not being unreasonable. See *Hanlon-Buchanan* v. *Burlington R.I.R. Co.*, 258 I. C. C. 519, affirmed 263 I. C. C. 603; *California Texas Oil Co.* v. *Bessemer & Lake Erie R. Co.*, 264 I. C. C. 147; *Pacific Chemical & Fertilizer Co.* v. *Penn. R. Co.*, 286 I. C. C. 468, and *American Republics Corp.* v. *Wichita Falls & S. R. Co.*, 259 I. C. C. 605. In these cases, the shippers showed a willingness "to take a chance of obtaining the necessary vessel space," and were denied relief.

The very existence of these cases demonstrates that the Commission was quite careful not to make any all-inclusive ruling that all so-called "frustrated" shipments during the war period were automatically entitled to the lowest published rate, regardless of what circumstances surrounded the "frustration" and what means were available and utilized by the shipper in efforts to avert the damaging consequences.

War Materials Reparations Cases, reported in 294 I. C. C. 5, *et seq.* (1955), involved a consolidated reparation proceeding including a large number of complaints attacking specific rates, charges and practices of various rail carriers during the period of 1941 to 1946, on Government freight. In denying relief there, the Commission said in part, at page 46:

> "The decisions involving so-called 'frustrated' shipments such as *General Carloading Co., Inc.* v. *B. & O. R. Co.*, 266 I. C. C. 243, cited by the complainant are

> readily distinguishable from the instant proceedings. There compliance with the applicable tariff provision was impossible because of non-availability of vessel space, occasioned by circumstances unforeseen when the shipments left points of origin. Rates higher than the export rates and the export rules, under the extraordinary circumstances there present, were found unreasonable because those circumstances were not foreseeable or susceptible of control by the shipper. Here the complainant's shipments conformed to its customary and predetermined plan and purpose. The circumstances attending their handling at and beyond the ports were not unanticipated so as to call for a change in such handling, but were completely under its control."

It is worthy of notice that *General Carloading, Inc.* v. *B. & O. R. Co., supra,* which was held to be so "readily distinguishable," in the above situation, is the latest among the group of Commission decisions cited on page 15 of the Government's Brief in this case and relied upon by it so strongly. These decisions are all likewise fully distinguishable from the instant case for the identical reasons stated.

The apparent keystone of the Government's entire argument that there should be a "referral" of the question of reasonableness of the domestic tariff rate in this case, is the following single sentence contained in the opinion of this Court in the case of *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, at page 291:

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission."

Three times is this isolated clause snatched from its context and quoted superficially in the Government's Brief in this case, in support of a legal proposition which is the very

reverse of the holding of the case itself, once in the Petition, at page 15, and twice in the Brief, at pages 10 and 13.

In reply to the shipper's contention that an exception to the tariff rule made it inoperative as to this shipment, the carrier argued that since the rule and exception had not been construed by the Interstate Commerce Commission, the Court was without jurisdiction to try the case. In upholding the court's jurisdiction and a judgment based upon a tariff construction in favor of the shipper, the Court said in part (at pages 290 and 291):

> "The validity of the tariff, including the rule and exception, was admitted. And there was no dispute concerning the facts. The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction."

And at page 294:

> "Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense, and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

Hence, an analysis of the entire opinion and the stated facts of the above case and applying the tests set forth in the opinion, actually supports this Respondent's position that no reference of the question of reasonableness to the Commission was needed or appropriate here. Compare *Armour & Co.* v. *Alton R. Co.*, 312 U. S. 195, 201-202.

In concluding the discussion under this heading, it is to be noted that, as was stated by the Court of Appeals (R. 44):

> "The question was not the reasonableness of rates, which everyone conceded to be reasonable, but which rate was applicable to the shipment(s) under the circumstances of the case, a question which the court was competent to decide."

The Government has carefully avoided any mention of the tariff rates in terms of dollars and cents. It launches its complaint on a more abstract level. It concedes that the established domestic rate is correct under ordinary circumstances, but claims that another already established rate (the existing export rate, whatever the amount may be) should be applied under these alleged unusual circumstances. It does not ask for a reference in order that another rate may be set up by mathematical calculation, based on such factors as may be involved. No accountants or experts are needed to handle any voluminous figures or technical language.

While the inquiry is superficially called a "reasonableness" of rate investigation, it is in essence a determination of whether the Government's own acts, with the facilities available to it, entitle it to special consideration or exoneration, with respect to the established rate. This is a practical question, an issue akin to those which courts handle every day without the aid of experts. It is similar in nature to the situation presented where a common carrier of goods, on being sued by a shipper for loss of goods in a severe storm, asserts "Act of God," as a defense. Such a defendant, of course, must not only establish the existence of a storm of "Act of God" proportions, but must further show that the loss of these particular goods was directly due to such a peril, and also that it was not reasonably possible for the loss to be

foreseen and averted by it. Hence, the inquiry actually sought here was not one of rate "reasonableness" in the usual sense, but one which the District Court was fully equipped to undertake and determine, without the aid of any other government agency, just as "reasonable care" is, in the ordinary tort case. The District Court, at the conclusion of the pre-trial hearing, had announced that it was prepared to hear evidence on which rate to apply (R. 22-23), but the Government failed to offer proof to sustain its position at the hearing on the merits, presumably because it had no such proof.

IV.

Consideration of Two-Year Limitation Period of Section 16(3)(b) of Interstate Commerce Act Was Not Essential to the Decision in This Case.

An examination of the District Court record shows clearly that there was no mention made in that court by either the District Judge or counsel, of the two-year limitation period contained in Section 16(3)(b) of the Interstate Commerce Act. The denial of the Government's motion to refer the case to the Commission was a denial based squarely on the merits of the motion, without consideration of any time limitation. Nothing had been submitted in support of the motion except that a state of war existed before the shipments had started; that the Government was in control of ocean shipping; that the shipments had been prepared for military purposes, and that as an incident of war, the port of Rangoon had fallen to the Japanese forces. No witness testified to show that any specialized administrative matters had to be passed on in deciding the case.

Nor was consideration of the two-year limitation regarded as necessary to a decision of the case by the Court of

Appeals. This is demonstrated by its opinion, in which it recites the one factual difference between this case and Case No. 1268, and then concludes:

> "The case, we think, is clearly governed by our former decision and nothing need be added to what was there said."

This conclusion is in full accord with what has been this Respondent's position.

In its Brief filed in the Court of Appeals, the Government had suggested that a hardship had been created by the fact that this Respondent's suit was not affected by the two-year limitation of Section 16(3)(a) of the Interstate Commerce Act, whereas the Government's right to prosecute unreasonableness complaints before the Commission, as to the same shipments, was barred by the two-year limitation in Section 16(3)(b) of the Act.

It was only in response to this statement of counsel for the Government that the Court of Appeals, after having fully decided the case, made additional observations to the effect that this was not a case involving complicated administrative questions, and that in any event, "all parties before the Court were barred by limitations" from seeking relief from the Commission. The Respondent fully concurs in the soundness of this latter observation of the court, as will be hereinafter shown, even though it was not necessary to a decision of the case.

On the record of the case, the Respondent had to bring this action in the District Court under the Tucker Act (Title 28 U. S. C., Section 1346(a)(2)), or in the Court of Claims (Title 28 U. S. C., Section 2501), in order to obtain payment. The Interstate Commerce Commission had no jurisdiction to hear it. If the existing situation, of having a two-

year limitation period apply to complaints of unreasonableness, as compared with the longer period of six years allowed for bringing undercharge suits in the Court of Claims, has any "unfair" or "uneven" effect, it is not a matter for which the carriers may be blamed. It is an objection based entirely on two independent Acts of Congress—for which this Respondent is not to blame.

But any seeming hardship which may now exist, was created in this instance by the delayed but deliberate act of the Government itself, in making use of the "cut back" remedy of Title 49 U. S. C., Section 66. That is an optional privilege by which the General Accounting Office purports to put into immediate effect its own views as to the proper freight charges due. It was not resorted to for these freight charges until 1946, four years after the charges originally assessed had been paid. If unreasonableness of the freight rate was the ground for making the "cut backs," as it presumably was, advance consideration should have been given as to whether, where and when that issue might be litigated thereafter, if need be. During the two-year limitation period, the Government voluntarily chose to rely upon the *ex parte* decision of its General Accounting Office, rather than submit the matter to the Interstate Commerce Commission for determination. At that time, it elected not to go before the Commission. Now it inconsistently pleads for that very privilege.

There was no showing made at the hearing of the case that the General Accounting Office did not know the facts regarding these shipments or could not have ascertained them during the statutory limitation period. Nor was there any assertion or proof that the period allowed was inadequate for discovering them. As already stated, there was no reference whatever to this period in the District Court proceedings.

There is a well-settled rule of judicial administration that where damages are sought by a party for the violation of a statute and the statute itself provides an administrative remedy, such remedy must first be exhausted. In this instance, there was a remedy available for two years, assuming that the Government had proper grounds for a reference, but the remedy was not then resorted to. This rule would seem to apply here.

See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50, and *First National Bank* v. *Weld County*, 264 U. S. 450.

Certainly, it is not sufficient for any shipper, on being sued for unpaid published tariff charges, to belatedly come into court and simply assert "charges are unreasonable," and thereby stave off liability, without any further foundation or effort.

V.

The Two-Year Limitation for Challenging Reasonableness of a Rate Before the Interstate Commerce Commission Is Jurisdictional and Limited the Commission's Power to That Period.

This Respondent hereby adopts in its behalf here, the Argument presented at pages 23-39 in the Brief filed for the Respondents, The Western Pacific Railroad Co., Bangor and Aroostook Railroad Co., and Seaboard Air Line Railroad Co., in Case No. 18 on the October Term, 1956 Docket of this Court, styled "*United States* v. *The Western Pacific Railroad Co., et al.*" as to the correctness of the statement therein that expiration of the two-year statutory limitation period for challenging the reasonableness of a rate before the Interstate Commerce Commission, deprives the Commis-

sion of jurisdiction to receive the Government's contentions as to alleged unreasonableness of the domestic published rate in this case.

CONCLUSION

It is respectfully submitted that the two decisions and judgments in the courts below were plainly right, and were fully in accord with reason and legal authority. The District Court was entirely competent to pass upon the uncomplicated set of facts presented and to apply the clear provisions of the appropriate tariff thereto. The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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